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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-452

CATHERINE J. HEALY, ET AL.,
Petitioners,

vs.

F. DON JAMES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

FRANK G. CARRINGTON, JR., ESQ.,
Executive Director,

RICHARD O. WRIGHT, ESQ.,
Associate Executive Director,

ALAN S. GANZ, ESQ.,
Secretary-Treasurer,
Americans for Effective Law Enforcement, Inc.,
228 North LaSalle Street,
Chicago, Illinois 60601,
Counsel for Amicus Curiae.

Of Counsel:

JAMES L. TENNANT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
Chicago, Illinois 60601,

FRED E. INBAU, ESQ.,
Professor of Law,
Northwestern University,
Chicago, Illinois 60611.

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> *are reasonable restraints in the classroom and what are reasonable restraints on the street corner.* (Emphasis added).

It is therefore not surprising that the same distinctions have been repeatedly applied by the lower federal courts since *Tinker*. See, e.g. *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969). As the Court stated in *Sword* v. *Fox*, 446 F.2d 1091, 1096-97 (4th Cir. 1971):

> In determining whether a college regulation restricting demonstrations is reasonable, the Courts must take into consideration both *"the special characteristics of the school environment" and that the regulation of student conduct is ordinarily the prerogative of the college authorities, with judicial intervention only when the circumstances are such as to "directly and sharply implicate basic constitutional values." For these reasons, the "precedents about the meaning of the first amendment in other areas of life can (not) be indiscriminately transferred to the university setting"*. . . . In testing any college regulation for reasonableness under these criteria, the Courts, it should be emphasized, are not concerned with "whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities. (Citations omitted) (Emphasis added).

It is accordingly clear that, contrary to plaintiffs' contention, the courts have not mechanically equated universities with other governmental institutions. And in the light of the specialized functions of a university there is no reason whatever why any court should do so.[6]

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[6] It is worth noting that colleges and universities are not the only government institutions which require, and have received, specialized constitutional treatment. It has long been held, for example, that the specialized functions of the courts justify restrictions different from those prevailing in other areas open to the public. See, e.g. *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF RESPONDENT.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Permission to file has been granted by the Office of the Attorney General of the State of Connecticut, counsel for Respondents and by the American Civil Liberties Union, counsel for Petitioners. Letters to this effect have been filed with the Clerk of this Court.

Interest of the Amicus Curiae.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political citizens organization, incorporated under the laws of the State of Illinois. AELE has been granted a tax-exempt status

as an educational corporation under Section 501(c)(3) of the Internal Revenue Code.

The basic purpose of AELE is to give to the law-abiding citizen a voice in issues of significance with regard to the criminal justice system. The major thrust of AELE's activity in furtherance of this aim has been through the filing of briefs, *amicus curiae*, in court cases of national import, the results of which will have a significant impact upon the enforcement of the criminal law or upon the overall effect of the rule of law in our society.

We believe that the instant case is just such a case. At issue is the right of a college administrator to deny official recognition and sanction on his campus to an organization which, in his judgment, refuses to respect the rights of others and constitutes a threat of potential violence and disruption to the orderly process of the educational institution in his charge.

The fabric of an open university has been torn and violence on the campus has become a national problem, as was noted by the Court of Appeals in its decision in the instant case.[1] Consequently, the power of the chief executive of an educational institution to exercise his reasonable judgment to preserve an open campus and protect his school from actual or potential disruption and violence is obviously an issue of overriding significance.

The issues in this case transcend the individual litigants and affect the powers of college and university administrators, nationwide, to maintain order upon their campuses, which is the first prerequisite to full enjoyment of free expression in the university. AELE believes that the principles of academic freedom should be accorded to *all* members of the academic community and not be reserved for the exclusive enjoyment of a few alienated dissenters. Therein lies the interest of this *amicus curiae*.

1. *Healy* v. *James*, 445 F. 2d 1122, 1131 n. 39 (2nd Cir. 1971).

SUMMARY OF ARGUMENT.

AELE in this brief supports the position taken by Respondents. Our arguments bear on the reasonable nature of the decision of President James to bar the SDS from CCSC and are concerned with the practicalities of the application of the First Amendment to the campus.

The threat posed by the SDS to the orderly operation of CCSC should be looked at in the perspective of the recent history of violence by the SDS nationwide. Evidence of SDS violence, compiled by investigative committees of both Houses of the Congress of the United States is presented.

Other realities of the First Amendment on campus are delineated including the futility of dealing with campus violence "after the fact" and the shortage of qualified college administrators and the terrible financial problems facing higher education in large measure because of campus violence.

Finally, we urge the Court to decide the instant case with the rights of *all* members of the campus community in mind, and to recognize the fact that if academic freedom is to be confirmed to the wishes of a disruptive few, the rights of the majority of students to learn in an atmosphere conducive to thought, guidance, and reflection must suffer as a consequence.

For these reasons this brief urges the Court to uphold President James' decision to bar the SDS as a valid and reasonable exercise of his authority.

ARGUMENT.

I.

THE SCOPE OF THIS BRIEF—THE APPLICATION OF THE FIRST AMENDMENT SHOULD REFLECT THE REALITIES.

AELE will reiterate neither the legal arguments made by Respondents brief as to why the decision of the Court of Appeals upholding President James' decision to bar the local chapter of the Students for a Democratic Society from Central Connecticut State College should be sustained, nor the policy arguments to the same effect made by *amicus curiae,* the American Association of Presidents of Independent Colleges and Universities (AAPICU). We do, however, agree with and support all of the arguments made by both briefs.

AELE will in this brief present to the Court data of a practical nature which we believe to be relevant to the resolution of the issues raised herein. This data is: 1) information pertaining to the nature and record of activism practiced by Students for a Democratic Society (SDS) as it constitutes a threat to open academic life and to the rule of law on the campus, and 2) information pertaining to some of the more practical adverse effects upon educational institutions and their administrators which have been caused by the campus disruptions of the SDS and similar organizations.

We believe these to be relevant to the issues raised by the instant case because they illuminate the far-reaching effects which this Court's decision will have upon administrators in other colleges and universities nearly all of whom have been, or may be confronted with the situation

faced by President James of Central Connecticut State College.

We believe that, in the final analysis, the central issue in this case is whether President James' decision to deny official recognition to the SDS at CCSC was reasonably calculated to protect academic freedom and other academic interests. Our arguments are directed towards considerations which establish the very reasonable nature of a decision, whether made by Dr. James or by any other educational administrator confronted with a similar situation, to deny such official recognition to a potentially violent and disruptive organization which demonstrably refuses to conform to the rules of an open campus.

The case at bar involves the application of the First Amendment to a troubled campus setting. Petitioners represent the interests of partisan activists, who espouse disruptive tactics, and contend for the First Amendment's protection. But the arguments must consider more than their interests because the rights of others in the campus community are affected in a very real sense by the disruption which has visited the schools. The schools are thus in the middle of a difficult conflict, and it is the intent of this brief to present the realities of the situation. We believe that First Amendment freedoms will have real meaning only if they are applied in a manner reflecting the realities of the situation.

Two courts in the instant case have already demonstrated full cognizance of the realities and the competing values at stake. Both the U. S. Court of Appeals[2] and the U. S. District Court[3] upheld President James' decision

2. *Healy* v. *James*, 445 F. 2d 1122 (2nd Cir. 1971).

3. *Healy* v. *James*, 319 F. Supp. 113 (D. Conn. 1970). The District Court had first required that Dr. James conduct an administrative hearing on the request of certain students to form a local SDS chapter at CCSC, 211 F. Supp. 1275. After the hearing Dr. James' decision to bar the SDS chapter from CCSC was upheld.

that, based on the record before him, the SDS would frustrate the college's established educational policies by fostering disruption and violence at CCSC.

Affirming the District Court, the Court of Appeals cited language from *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969); and found that, in reaching his decision to bar the SDS, Dr. James properly acted within "the comprehension of the state and of school officials, consistent with fundamental constitutional safeguards, to proscribe and control conduct in the schools." 393 U. S. at 507.[4] Additionally, the Court upheld the reasonableness of the inquiries about the SDS nationally which were made by President James and which led to his decision to deny recognition.[5]

It is apparent that the Court of Appeals applied a "reasonableness" test to the inquiries made by President James and to his judgment based on his findings pursuant to such inquiries. This, we submit, was the proper test for the Court to apply;[6] and it is the test which should be upheld by this Court, with regard to the instant case and for the benefit of other academic administrators who are faced with similar situations. We believe that the Court of Appeals properly rejected the absolutist view of the rights

4. 445 F. 2d at 1132 also citing *Eisner* v. *Stamford Board of Education*, 440 F. 2d 803 (2nd Cir. 1970) and *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969).

5. 445 F. 2d at 1132 n. 39: "The *reasonableness* of the inquiries made by President James in a nationwide campus atmosphere of ticking timebombs can hardly be open to serious question."

6. *See, Sellers* v. *Regents of University of California*, 432 F. 2d 493, 499 (9th Cir. 1970), where the Court upheld the defendant's refusal to permit the use of university facilities. The Court said: "Additionally, we must recognize that First Amendment rights are not absolute. Regulation as to time, place, and manner of the exercise of such rights is proper when reasonably related to a valid public interest. *Callison* v. *United States*, 413 F. 2d 133 (9th Cir. 1969)."

claimed by Petitioners under the First Amendment's guarantee of freedom of assembly;[7] and that it properly sought to determine, and did determine, that President James' decision was in the circumstances reasonable, as was claimed by Respondent's brief in the Court of Appeals.[8]

This brief, then, will present a realistic picture of the troubled situation faced by school administrators and of the competing interests which they are compelled to consider. Both are factors in determining the reasonableness of a school administrator's decision as to whether or not official recognition should be granted to an organization which is potentially disruptive and which openly refuses to accept the established rules of conduct on a campus.

II.

THE HISTORY OF VIOLENCE AND DISRUPTION OF THE SDS SHOULD NOT BE IGNORED.

The reasonableness of any response to a given threat can only be judged by considering the nature of the threat itself. This case involves an organization, the SDS, which has been a primary vehicle for disruption and violence on campuses across the nation. Thus, the standard of reasonableness for judging a refusal to grant official recognition to such an activist organization can be weighed only in the context of the threat of disruption and violence which the SDS actually presents and the harm which the SDS has actually caused to university life.

During the time span in which Dr. James made and subsequently affirmed his decision to bar the SDS from CCSC (October 1969 to June 1970) violence and disruption on college campuses had reached near epidemic proportions. The situation was described by a report, issued in October

7. Petitioners Brief in the Court of Appeals p. 11.
8. Respondents Brief in the Court of Appeals p. 5.

of 1970, by the Committee on Internal Security of the United States House of Representatives:[9]

> The school year 1969-1970 saw a sharp increase in protest demonstrations on college campuses.
>
> * * * * * *
>
> A total of 1,785 demonstrations were recorded by the close of the school year, F. B. I. Director Hoover announced. Sit-ins and building seizures numbered 313; ROTC installations were attacked in 281 instances; 73 protests involved military recruiting on compus; and 101 actions opposed Government research or corporate recruiting. In addition campuses were plagued by 246 instances of arson or attempted arson and 14 bombings. As a result of disruptions, 8 individuals died, 462 were injured and damages exceeded $9,500,000.00, the F. B. I. Chief reported (p. 150).

This was the background against which President James was called upon to decide whether or not to grant recognition to a local chapter of an organization which had been at the forefront of campus disruptions nationwide.

The fact that the SDS was often the prime mover in situations of campus violence and disruption cannot be the subject of serious question. The full extent of SDS leadership in college disruptions will probably never be known, but both the United States Senate and the United States House of Representatives conducted extensive investigations into the involvement of the SDS with campus violence and the results clearly indicate that a significant amount of such violence was, in fact, instigated, encouraged, and participated in by numerically small but highly active SDS members. For example, the House Committee on Internal Security (HCIS) concluded in this regard:

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9. Anatomy of a Revolutionary Movement: "Students for a Democratic Society." Union Calendar No. 750, 91st Cong. 2nd Session, House Report No. 91-1565. Hereinafter referred to as HCIS Report.

The potential of the SDS for creating campus disorders has been demonstrated to be far out of proportion to its size. A relatively small number of SDS activists was able, in a very short time and against the will of a great majority of the student body, to disrupt some aspect of the educational process on many of the nation's campuses.

While accurate statistics are not available, it is believed that less than 2 percent of all college students have engaged actively in any disorders causing physical injury or property damage. However, some of the actions of SDS militants have struck a sufficiently responsive chord to enlist the sympathy of many less militant students and to neutralize the campus "silent majority." For example, in one of the cases investigated by HCIS in one spring of 1969, the 15 to 20 estimated hard core SDS activists, even when supplemented by some 150 to 200 sympathizers, appeared insignificant when compared with a total student enrollment of 21,000. This SDS minority nevertheless succeeded in provoking four disturbances on the campus and forced the Kent State University Administrators to divert many man-hours and funds to the task of combating SDS efforts to disrupt the functioning of the University. (It was with profound shock that the Nation received the news May 4, 1970 of the fatal shooting of four Kent students during another campus demonstration.)

A small band of SDS members in a large student population was also successful in creating a campus disorder at Georgetown University where there were approximately 20 SDS members in a student body of over 3,000. In addition, the SDS chapter at George Washington University, which had a hard core membership of about 20, mustered 150 out of a total of 13,500 to a radicalizing movie film presentation which immediately preceded one seizure of the university building housing the Sino-Soviet Institution.[10]

10. HCIS Report, pp. 152, 153.

The incidents just described by the HCIS Report, indicating the extent of disruptions caused by a relative handful of SDS members and their supporters, are but one part of a much larger pattern of SDS instigated violence upon the campus. The HCIS Report for example lists other SDS linked disruptions in 1969:[11]

SDS members and activists:

Jan. 1969 — collaborated with other campus activists at the University of Chicago in a sit-in over the firing of a "Marxist" professor. (91)

helped break up a trustees' meeting at Stanford University in a protest against counter insurgency and war related research. (91)

reportedly engaged in vandalism in a Columbia University placement office when frustrated demonstrators could not locate Army and Air Force recruiters on campus. (91)

Feb. 1969 — were reported involved in small-scale disorders over dismissal of a professor at Michigan State University. (91)

were involved in "mobile" picketing which drove away a CIA recruiter from the University of Houston. (91)

were involved in driving off a Standard Oil Company recruiter from San Jose State College with an aftermath of smashed windows and kicked-in doors. (91)

11. Numbers in parenthesis after each of the following described incidents indicate the page of the HCIS Report at which the incident is described.

March 1969	engaged in a physical attack on other students to disrupt and force cancellation of a speaking engagement at Georgetown University by San Francisco's Mayor. (92)
	participated in a screaming, chair-throwing protest which cut short a speech by Dr. S. I. Hayakawa at the University of Colorado. (92)
	co-sponsored a "talk-in" which disrupted the efforts of representatives from the Chase Manhattan Bank to recruit at Cornell. (92)
April 1969	were involved in the forcible ejection of officials from a Harvard Administration building. (90)
	were involved in the occupation of a building at American University. (90)
	were involved in the occupation of a building at George Washington University. (90)
	were involved in the occupation of the building at Columbia University. (90)
May 1969	were involved in the occupation of a building at Stanford University. (90)
	were involved in the take over of a building at Northwestern University. (90)

This sampling of SDS activity during the first few months of 1969 delineates incidents which have one feature in common: an attempt by the SDS through the use of violent tactics to subordinate the will of the majority of students to that of a disgruntled minority of dissenters. The HCIS Report succinctly summed up the effect of SDS violence and disruption:

A particularly troubling aspect of SDS tactics was the

> willingness to use the most violent and obnoxious means to reach SDS goals such as the seizure of university buildings, disrupting of classes, holding administrators hostage, and the silencing of those who disagreed with SDS objectives. Such tactics are anathema to the principles of academic freedom which undergird the entire educational system. They can in no way be justified as a means of obtaining rights allegedly denied or in protest of inequities unremedied. The violent disruption of the University is, of itself, an infringement of the right of professors to teach and students to learn free from harassment and interference.[12]

The foregoing findings of the HCIS, we submit, present a picture of the SDS which would justify as reasonable the denial of official campus sanction to such a group by President James or by any other college administrator. These findings of the Committee of the House of Representatives charged with the investigation of threats to our national security from within[13] were buttressed by a report filed by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate.[14] The Subcommittee stated in its findings:

> Disorder, riotous conduct and senseless violence are alien to the traditionally peaceful campuses of American universities and colleges. There is no rationale by which they can be excused or condoned. They disrupt or destroy serious scholarship and cripple edu-

12. HCIS Report, p. 154.

13. Rules of the House of Representatives, 91st Cong., Rule XI POWERS AND DUTIES OF COMMITTEES ; 11. Committee on Internal Security found in HCIS Report at p. VI.

14. Riots, Criminal, and Civil Disorders, College Campus Disorders, Second Interim Report of the Committee on Government Operations, United States Senate, made by its Permanent Subcommittee on Investigations, March 23, 1971. 92nd Cong., 1st Sess. Senate Report No. 92-42. Hereinafter Investigations Subcommittee Report.

> cational processes. If carried repeatedly to the extremes which the Nation has seen during the past several years, they will destroy many of our major educational institutions.[15]

Commenting specifically on the SDS (and, incidentally, about the impact of local "offshoots" of national militant groups"—one of the issues in the instant case), the Senate Investigations Subcommittee found that:

> Testimony established that Students for a Democratic Society and the Black Panther Party, as well as affiliates of those organizations and others of similar philosophy, are guiding forces in a large percentage of the campus disruptions in recent years. However, the titles of organizations are not conclusive in themselves; frequently, local issues and protest movements dictate the names of organizations on particular campuses, although it has been shown clearly that the aims and tactics of local groups often are patterned upon and are basically identical with those of nationally known militant and revolutionary organizations.[16]

The findings of two of the investigative committees of the highest legislative chambers in the nation are unequivocal with regard to the actual and potential disruptive nature of the SDS upon campuses in the period 1969 and 1970.[17]

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15. *Id.* at 37.

16. *Id.* at 38.

17. See also, for examples of exhaustive analyses of the SDS disruptions on College campuses: Michener: *Kent State, What Happened and Why*, Random House and the Reader's Digest Association 1971 (a chronicle of the role of the SDS in shaping the Kent State Tragedy of May 4, 1970) and Methvin: *The Riot Makers*, 1970, Arlington House New Rochelle, N. Y., Ch. XIV, Columbia: A Case Study of Campus Demolition, p. 408 ff.; and *Communism and the New Left*, 1970 U. S. News and World Report, Inc. Washington, D. C. Ch.1 The American Left: Old and New p. 13 and Ch. VI, Target Youth p. 111.

The HCIS Report ends with the conclusion that by 1971 the SDS, nationally, through its mindless advocacy and use of violence and through its fragmentation into splinter groups, had become an organization which could no longer be considered a viable force on the campus. This is undoubtedly true in many respects, however the HCIS Report warns that:

> Just because the organization of SDS is now virtually a thing of the past does not mean that problems raised by the rapid proliferation of campus unrest of the decade of the 1960's are apt to fade. They may become more critical as newer organizations take shape and emerge as the new voice of radicalism among American students.[18]

Based on the foregoing information, we submit that:

1. In the instant case, President James' judgment that the SDS, based on its recent history, would be a disruptive influence at CCSC was reasonable, and;

2. The judgment of any other college administrator to deny official recognition to the SDS, or to an organization with a similar record, would be equally reasonable.

III.

THE APPLICATION OF THE FIRST AMENDMENT TO COLLEGES AND UNIVERSITIES SHOULD BE MADE WITH DUE REGARD FOR THE PRACTICAL PROBLEMS INVOLVED IN CAMPUS DISRUPTIONS.

A. The Absolutist Construction of the First Amendment Suggested by Petitioners Disregards the Realities of the Results of Campus Violence.

Petitioners, in their brief, have taken an absolutist approach towards the First Amendment rights of those students who wished to form an SDS Chapter at CCSC. They

18. HCIS Report p. 158.

state flatly that "Respondents Must Use Less Drastic Means [than barring the SDS chapter from CCSC] to Secure Its Valid Interest in Being Free of Illegal Disorders". (Br. p. 31.) Petitioners would have this Court relegate President James to three kinds of responses to illegal activity by students or groups of students: (1) punishment of individual students after unlawful acts have been committed by them, (2) withdrawal of an organization's recognition, and, (3) injunctions against illegal conduct.[19] All three contain the common element that the disruption must actually have happened (or be clearly and presently threatened) before any action can be taken. Thus, it is suggested by the Petitioners that the First Amendment somehow requires a college administrator to grant official recognition upon his campus to a demonstrably violence-prone group of students and then to wait to see if and when they choose to burn a ROTC building, occupy a hall, disrupt a meeting or kidnap one or more of the college officers, *then and only then*, if Petitioners' theory is to be accepted, can the administrator act to deal with disruptions which might have been prevented by his refusal to recognize such violence-prone group in the first place.

The Sixth Circuit Court of Appeals in *Norton* v. *Discipline Committee of East Tennessee State University*, 419 F. 2d 195 (5th Cir. 1969) recognized the fallacy of such an absolutist view of the *Tinker* rule and of the First Amendment. In upholding a school disciplinary action against students who distributed false and inflammatory lit-

19. Br. p. 31 and 32. Petitioner's brief admits with admirable candor that the latter two remedies raise "conceptual", "factual" and "sometimes procedural" difficulties. This is a masterpiece of understatement. Withdrawal of recognition from the SDS after a campus has exploded into violence is hardly an effective answer to the threat of disruption and in case after case, when the injunctive process has been used, and the resultant confrontation with civil authorities enforcing the injunction have escalated the violence far beyond its former limits.

erature, the Court differentiated *Tinker* on the basis of the reasonable nature of the action of the School in the *Norton* case. The Court stated at page 199:

> It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. *The college authorities had the right to nip such action in the bud and prevent it in its inception* (Emphasis added).

We are in complete agreement with the holding in *Norton*, the legal arguments of counsel for Respondent, and the policy arguments of *amicus curiae*, AAPICU. The sense of their point is that the First Amendment must have a realistic construction which is not absolutist but which has regard for the interests of all members of the campus community. We will not elaborate on these arguments here. We seek in this section, rather, to present to this Court data of a rather practical nature concerning the *effect* of campus violence upon the colleges or universities involved in order again to focus upon the reasonableness of decisions such as that of Dr. James'.

The overall tragic effects of campus violence needs no extended discussion. The names "Kent State", "Columbia", and "San Francisco State", for example, have taken on a meaning in contemporary parlance totally different from their designation as institutions of learning. Each, in its own way, serves as a symbol of massive, destructive campus violence which, at least temporarily, brought an entire academic entity to its knees. There are, however, less dramatic but nevertheless extremely important effects of campus violence, aspects of the problem which do not receive extensive media coverage but which demonstrate enormous dangers to the continuance of our system of higher education. We will consider two of these practical problems caused by student disorders: the current short-

age of qualified individuals willing to become college administrators, and the tremendous monetary costs of campus violence.

B. College Presidents Are Quitting in Despair.

In August of 1970 *U. S. News and World Report* presented a truly startling article entitled "Why College Presidents are Quitting."[20] The article begins with the following terse paragraphs summing up the situation:

> "The wear and tear of academic life in 1970 is driving college presidents out of their jobs in numbers that educators view as "alarming."
>
> All over the country, heads of colleges and universities are deciding they have had enough of student revolt and its attendant troubles.
>
> The administrators are quitting by the dozens and heading for more peaceful occupations.
>
> Good replacements are getting harder to find and harder to keep in the face of mounting campus pressures. There is also a shortage of competent administrative deans.
>
> According to figures compiled by the American Council on Education, the *annual turnover in college presidencies has jumped nearly 80 per cent in the last year* at 30 and 31 (Emphasis added).

As evidence of this fact, *U. S. News* reported that, as of the time that the article was written, universities which were looking for new presidents included Harvard, Stanford, Wisconsin, Arizona State, Texas at Austin, Texas A & M and the State University of New York.[21] Additionally, the article reported, the presidents or chancellors of Rutgers, the State University of New Jersey, the Uni-

20. U. S. News and World Report, August 30, 1970, at 30.

21. *Id.* at 30.

versity of Texas System and the Universities of Arizona, New Hampshire, Illinois, North Dakota and Purdue would be leaving within the year.[22]

Indicative of the manner in which violence, or the threat of violence is affecting the turnover in college presidents is the following excerpt from this article:

> *Occupational hazards.* Residences of College presidents have been picketed, stoned and threatened with bombing. Frequently their offices have been broken into and ransacked.
>
> President Edward H. Levi of the University of Chicago and Dr. Karl L. Falk, former acting president of Fresno State College in California, are among administrators who have found it advisable to employ bodyguards.
>
> Hilton C. Buley, retiring president of Southern Connecticut State College in New Haven, keeps fire extinguishers on every floor of his home—"just in case".
>
> President James E. Perdue of the State University of New York at Oswego has complained of telephone calls "of the most vicious type" that have been made to his home at all hours of the day and night.
>
> Samuel E. Braden, who resigned as President of Illinois State University at Normal, has told friends that he and his family can no longer stand "the ever-present threat of violence".
>
> A week after he was burned in effigy at a student demonstration, Dr. James F. Tucker quit as president of Virginia State College in Petersburg "for reasons pertaining to the best interest of my immediate family".
>
> When Dr. Kenneth S. Pitzer announced his resignation at Stanford on June 25, he explained: "Entirely too much of my effort has been devoted to matters of a purely administrative or even of a police

22. *Id.* at 32.

nature". A return to a more scholarly life, he added, "will be most welcome".

Dr. Pitzer had to call police to his campus 13 times in May. During student demonstrations, windows in his office were smashed, his house was painted with slogans and he himself doused with paint.

The University of Wisconsin was in the fourth day of a student demonstration against the war when President Fred Harrington decided to give up his $47,500-a-year post. His resignation was announced on May 8 to become effective October 1 (page 30).

The president of a college, whether it be state or privately owned, is the chief executive of that college. He is, in the final analysis, responsible for everything that transpires upon the campus in his charge. The excerpts from the article just cited indicate clearly the toll which is being taken by the ravages of violence upon these chief executives.

The job of a college president in these troubled times is difficult enough; it should not be made more difficult by strained and absolutist interpretations of the First Amendment which require a college president to recognize patently violence-prone groups despite the fact that, in his best judgment, they constitute a direct threat to academic order and the rule of law on his campus.

C. Our Colleges and Universities Cannot Bear the Monetary Cost of Campus Violence.

It is common knowledge that our institutions of higher learning are in financial difficulties such as they have never experienced before. One major contributing factor to the red ink status of most colleges and universities is the tremendous financial toll exacted by campus disruptions.

Actual costs are staggering. For example in the school year 1969-70, according to the HCIS report, damages

exceeded $9,500,000.[23] And compounding these already astronomical amounts is the fact that insurance costs have risen at incredible rates, if insurance is available at all. Thus, in an October 16, 1970 article in the Wall Street Journal the point was made that:

> The recent rise in student unrest and vandalism has pushed many college property insurers to raise insurance rates drastically, boost deductible amounts or drop out altogether from the college insurance market. At the University of California's nine campuses, for example, insurance costs skyrocketed 800% in two years, and at Southern Illinois University at Carbondale, insurance premiums this year were $342,000. A year ago they were only $32,000.[24]

An article in the February, 1972, issue of *Readers Digest:* "Hard Times Hit the Campus", by Carl T. Rowan and David M. Mazie, describes the current financial crises which face our institutions of higher learning. The article delineates in some detail what Clark Kerr, former president of the University of California and currently chairman of the Carnegie Commission of Higher Education calls "the worst financial crises in the history of education." At 201.

Mr. Rowan and Mr. Mazie point to a study of the financial crises facing higher education conducted by Earl F. Cheit, professor of business administration at the University of California at Berkeley, which estimated that "nearly two-thirds of the nation's 2,500 plus colleges and universities, private and public, large and small, are in financial difficulty or headed for trouble" at 202. One of the article's major conclusions is the flat statement that:

> If this financial crunch continues unchecked, it could slam college doors on millions of low and middle income youngsters. At 202.

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23. HCIS Report p. 150.

24. *Wall Street Journal*, "Insuring the Campus Grows More Costly; 'Confrontation Looms'" Oct. 16, 1970 at 4.

The authors list several reasons for this monetary crisis including the general economic picture in this country today, rising costs, poor financial management, and inefficient use of facilities. However, significantly, for the purpose of this brief, student violence is mentioned as a major contributing factor to the "crunch". Thus:

> Campuses have lost their favorite child appeal *in the wake of student protests*, a national belt-tightening, and a growing public disenchantment with the operation and management of higher education. At 202. (Emphasis added.)
>
> * * * * *
>
> Balance sheets generally started to show signs of trouble in the late 1960's. Cost increases were spurned by inflation, rising salaries, increased enrolments *and campus disturbances* . . . At 202. (Emphasis added.)
>
> * * * * *
>
> At the same time that costs were leaping, income began levelling off. Federal research grants . . . dropped to growths of 2 per cent . . . . giving by alumni and others suffered from general economic conditions, changes in tax laws *and indignation over campus disruptions.* At 203. (Emphasis added.)

We submit that the public is disenchanted with our university situations; because the public senses, quite accurately, that by becoming hotbeds for violent protest the universities are straying from their educational purposes.

Again, we ask this Court to consider practicalities. Should a college president, trying desperately to furnish a quality education within a greatly limited, or even a deficit budget, be forced to welcome upon his campus a group which he reasonably believes may engage in disruption to such an extent that he may incur perhaps hundreds of thousands of dollars worth of property damage, see his insurance costs double and redouble, and as a result of student disruptions, see his alumni donations decrease markedly?

We know of nothing in the First Amendment which should be construed to force such a situation upon a college president. We recognize that such monetary considerations are not, of course, controlling when *real* constitutional rights are involved; but we believe that the "rule of reason test" applied by the Court of Appeals in the instant case represents a proper balancing of the rights involved and, further, that such a test should encompass a consideration of the potential dollars and cents cost to a given institution which vandalism and physical damage by activist inspired riots could do. We also wonder how many desperately needed scholarships for deprived young men and women from thet ghetto could have been awarded if millions of dollars had not been utilized to pay for increased insurance premiums, physical damage and other monetary losses occasioned by organizations such as the SDS.

IV.

THE COURT SHOULD AFFIRM AN APPLICATION OF THE FIRST AMENDMENT TO THE UNIVERSITY WHICH PERMITS ENJOYMENT OF FREE EXPRESSION BY MORE THAN A FEW INTOLERANT ACTIVISTS.

A. What Exists Here Is an Opportunity to Define a Balanced View of the First Amendment.

Petitioners brief, at page 15, states quite accurately that: "This case gives the Court the opportunity to implant the First Amendment firmly on the college campus." We do not urge this Court to restrict the application of the First Amendment on the campus. To the contrary, AELE urges that this opportunity be taken to implant a *balanced* application of the First Amendment on the campus which protects free expression for *all*, rather than for a few.

We believe that others beside violent activists have a vital interest in freedom of expression in the university. Moreover, we believe that those who choose to express themselves outside of the orderly framework of university life, make it impossible for the majority of the campus community to exercise their own rights of free expression.

Therefore, we urge this Court to uphold President James' decision based upon the First Amendment considerations, for President James' decision was made in order to preserve the integrity of free expression on his campus.

B. An Absolutist View of the First Amendment Can, in Reality, Stifle Freedom of Speech and Assembly Upon the Campus.

The university, because of the special nature of a campus community, has experienced a concentrated development of the political dynamics which developed in the nation as a whole during the 1960's. The SDS was a primary vehicle for that development, and its history parallels the history of leftist political activism of the period. SDS and political activism changed qualitatively in those years from democratic action to totalitarian force, but in some instances the lower courts have yet to understand fully the nature of that change. As a result, meaningful freedoms on the campus have actually been subordinated to the attacks of the new totalitarians.

Whatever its original aims and methods in the last half of the decade, the SDS rejected traditional political action in favor of programs which contemplated action outside the democratic processes, and, as has been described elsewhere in this brief, its members resorted to violence and intimidation.

The new mode of political activism resulted in severe disruption of the schools. Yet, far too often, the Courts continued to apply Constitutional standards as if the student activists had remained within the tradition of democratic action. Lower court cases established rules greatly limiting possible responses by school authorities. The rules compelled the schools in some cases to permit almost any type of activism, up to and including actual violence and severe disruption. Even where disciplinary action was permitted, the courts compelled school administrators to adopt due process proceduralisms akin to the rules of the criminal justice system.[25]

At the same time, this Court established "academic freedom" as a special concern of the First Amendment in *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1951), *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), and *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969).

We believe that true academic freedom has suffered as court-imposed limitations on the order-keeping and disciplinary powers of school authorities have increased, for the real intolerance towards open discussion has been promulgated by the new activists, not by the authorities. Yet, in many cases, the authorities have not been permitted adequate means with which to respond.

Lower court cases, in some instances, failed to recognize that First Amendment problems had changed with the qualitative change in political activism. Often the lower courts failed to see that the power of school authorities to protect free expression was equally essential.

The First Amendment would be no more than an abstraction if in the name of free expression academic freedom cannot be preserved for the whole of the academic com-

25. Petitioners' brief cites numerous examples of the cases which developed these standards of response to school problems.

munity. We submit that it should now be recognized that an orderly framework protected by school authority is needed if freedom of expression is to have any real meaning in our schools.

This Court, in the instant case, has an opportunity to reaffirm the vitality of the First Amendment by holding that the First Amendment freedoms established in *Sweezy, Keyishian,* and *Tinker* must be applied to all; that these freedoms can be enjoyed only in the framework of an orderly campus situation; and that school officials have the duty to protect this interest from those who refuse to work within that framework.

In this case, it had been demonstrated to the satisfaction of President James that the SDS should not be given recognition on his campus because the organization had no regard for the free speech rights of others. In his October 30, 1969 Memorandum, President James found that he could not officially sanction "an organization which openly repudiates those principles [freedom of speech, academic freedom and the freedom of establishing an open forum]". By making this decision President James acted to maintain his campus open to the free expression of ideas of all of the members of the university community.

In May of 1970, before President James made his final decision, hundreds of universities were closed down in a massive spasm of campus violence. While the schools were closed, student partisans appropriated campus facilities for their exclusive platform thereby totally disregarding the academic freedom of others, which the normal university routine should have assured.

Any construction of the First Amendment which would permit this would paradoxically destroy academic freedom. This paradox is demonstrated by the fact that recently several groups of non-dissenting students have filed legal

actions in an attempt to insure that *their* freedom of expression on an open campus be protected. Two suits are representative: *Belk* v. *Chancellor of Washington University,* case No. 70C 151 (1) in the Eastern District Court of Missouri,[26] and *Asher* v. *The Regents of the University of Wisconsin,* 318 F. Supp. 82 (E. D. Wis. 1971), now on appeal in the Seventh Circuit, Case Nos. 71-1075, 71-1116. The *Asher* case stemmed from the May 1970 disruptions which embroiled many campuses.

Obviously, the benefits of the First Amendment are not the exclusive property of any one group. If, as the students in *Belk* and *Asher* contend, the university violates the rights of the majority of students by permitting the disruption of campus life; the application of First Amendment rights gives rise to a conflict: what is the school official to do when the free expression of one group conflicts with the opposing free expression of a second group?

The answer to the foregoing question is that the First Amendment must be applied in the framework of the orderly procedures of university life which contemplate a free and open academic atmosphere available to *all.* This is what President James required of all of the student groups which had official recognition on his campus. The U. S. District Court for the Eastern District of Michigan saw the proper resolution of such a conflict in *McAlpine* v. *Reese,* 309 F. Supp. 136 (E. D. S. D. Mich. 1970). Plaintiffs in that case sought to enjoin the enforcement of a Detroit ordinance after a violent confrontation in a school. The Court refused, saying:

> But it is apparent that there is an attempted erosion, in the name of the First Amendment, of other freedoms equally dear. This is the case before us. The freedoms of a child to learn in an atmosphere con-

26. A motion to dismiss in *Belk* was decided in favor of the plaintiff students, in an unpublished decision.

ducive to thought, guidance, and reflection, the freedom of an instructor to teach without fear of disruption of his class or diversion of its attention—these freedoms are subservient to none. The cloak of the First Amendment is not so broad as to cover their destruction, even their disruption. What certain First Amendment protagonists have overlooked in such violent assertions of their constitutional rights as we have before us, is that the asserters themselves have duties and obligations as well as constitutional rights. Under our scheme of things, right and duty travel a two-way street. The assertion of a constitutional right does not absolve the asserter from the performance of his own duties and obligations. Nor does it permit him to violate the reasonable and constitutional rights of others. 309 F. Supp. at 140.

C. It Is Not a Prior Restraint on the Rights of Individual or Groups to Require Them to Conform to the Orderly Framework of Free Speech.

In the brief of *amicus curiae*, the American Association of Presidents of Independent Colleges and Universities, it is pointed out that the university represents a unique situation with regard to the application of the First Amendment. Rules of conduct have developed to give life to the special, functional purpose of the university.

Without reiterating this argument, AELE submits that it is not an unconstitutional prior restraint to those rules which protect the functional purpose of the university. As did the school regulation[27] cited by President James in the instant case, university rules generally recognize the right of free expression; but additionally, they require respect for others' rights within the university community. This is a rule of free dialogue which is basic to the intellectual life which a university desirably fosters.

27. Petitioner's Exhibit B.

Free dialogue assuredly does not result from the activism of campus totalitarians, for they destroy academic freedom and intimidate the entire university in their attempts to force their point of view. In disregarding the rule of reason upon the campus, they endanger the functional purpose of the university and the rights of all those who depend on the free discourse which it sponsors. Obviously, school officials cannot permit this. It is inadequate to suggest that such violations can be handled after fact. The damage to the university has already been done, for academic freedom is a fragile thing.

The harm to the university life which disruption causes goes for beyond a few classes postponed or a few desks broken. Faculty and student morale is shattered, legitimate authority is more readily flouted in later "confrontations," and valuable time of faculty and students is expended in disciplinary hearings and meetings. (It is sometimes forgotten that a faculty is hired not to run hearing boards but to teach). Possibly the worst result is the factionalization of what was once a community, so that the university becomes a kind of spiritual corpse; the spirit and life are drained away replaced by poisonous surliness, impatience, and intolerance quite alien from an atmosphere of cooperation and mutual respect.

The only defense of the university is to restrict from campus those who refuse to accept its rules of orderly discourse and scholarship. This defense should not be held to be an invalid prior restraint on freedom of speech, so long as it is reasonably calculated to protect the proper functioning of the school.

This was recognized by the District Court for the Western District of Michigan in *Cholmakjian* v. *Board of Trustees of Michigan State University,* 315 F. Supp. 1335 (W. D. S. D. Mich. 1970). This case involved a civil suit

against Michigan State University arising from a disruption in May, 1970. Plaintiffs had been arrested in a protest occupation of a school building. The Court refused to grant a preliminary injunction against their prosecution, stating:

> The court can only add that the University has the right and the duty to insure that the unfettered pursuit of truth, knowledge and understanding is not deliberately interrupted by those who seek to advocate, to the detriment of the above values, their own partisan interests. It thus follows that the University may act when it reasonably forsees that action may be necessary to prevent such a result. 315 F. Supp. at 1347.

Thus, we submit that it should not be held to be an impermissible prior restraint to require one to respect the free speech and thought of another in the university context, and reasonable means to that end should be commended, not condemned, by this Court.

CONCLUSION.

In this brief we have asked this Court to reject the absolutist approach to the First Amendment, contended for by Petitioners, in favor of the "rule of reason" test applied by the courts below. If, as we contend, a rule of reason test is to be applied to Dr. James decision to bar the SDS from CCSC then practical arguments such as we have raised—the nature of the threat of the SDS, the scarcity of qualified college administrators which campus violence has caused, and the monetary costs of such violence—should be considered in determining the reasonableness of the decision.

We urge this court to uphold the decision of the Second Circuit Court of Appeals below and to rule in favor of Respondents.

Respectfully submitted,

FRANK G. CARRINGTON, JR., ESQ.,
Executive Director,

RICHARD O. WRIGHT, ESQ.,
Associate Executive Director,

ALAN S. GANZ, ESQ.,
Secretary-Treasurer,
Americans for Effective Law Enforcement, Inc.,
228 North LaSalle Street,
Chicago, Illinois 60601,
Counsel for Amicus Curiae.

Of Counsel:
JAMES L. TENNANT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
Chicago, Illinois 60601.

FRED E. INBAU, ESQ.,
Professor of Law,
Northwestern University,
Chicago, Illinois 60611.